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NO. 84 - 1090

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SYLVIA LOSTAL, HYMAN and LORRAINE SPIERS, BERENICE ROSENBERG and HELEN GALIARDI,

Plaintiffs-Petitioners,

—against—

MANVILLE CORPORATION, JOHNS-MANVILLE CORPORATION, JOHNS-MANVILLE SALES CORPORATION, JOHNS-MANVILLE PRODUCTS CORPORATION, UNARCO INDUSTRIES INC., formerly known as UNION ASBESTOS & RUBBER CO., EAGLE-PICHER INDUSTRIES, INC., SOUTHERN TEXTILE CORPORATION, formerly known as SOUTHERN ASBESTOS CORPORATION, H. K. PORTER COMPANY, INC., RAYBESTOS-MANHATTAN, INC., RAYMARK CORPORATION, RAYMARK INDUSTRIES, INC., OWENS-ILLINOIS CORPORATION, OWENS-CORNING FIBERGLAS CORPORATION, PITTSBURGH-CORNING CORPORATION, KEENE CORPORATION, G.A.F. CORPORATION and NICOLET INDUSTRIES, INC.,

Defendants-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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COUNTER-STATEMENT OF QUESTION PRESENTED

Do the traditional state law claims of asbestos-related torts alleged by plaintiffs-petitioners -- land-based shipyard workers -- bear the significant relationship to traditional maritime activity which is a necessary predicate to admiralty jurisdiction and to the invocation of the specialized rules of federal admiralty law?

The district court and the court of appeals answered in the negative.

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Defendants-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Petitioners seek a writ of certiorari from a judgment of the United States Court of Appeals for the Second Circuit, filed October 5, 1984, which affirmed judgments of the United States District Court for the Eastern District of New York (Sifton, D.J.) dismissing the complaints in these actions for lack of subject matter jurisdiction.

All four petitioners alleged that they were shipyard workers engaged in various occupations and activities relating to construction and repair of ships.* All alleged they were exposed

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* The persons alleged to have been exposed to asbestos-containing products are deceased in three of the four cases: Lostal, Rosenberg, and Galiardi. For the sake of brevity, references to "petitioners" include all relevant persons allegedly exposed to asbestos-containing products.

to asbestos-containing products in the course of this employment.

Respondents* moved in the district court to dismiss the complaints for lack of jurisdiction over the subject matter. By a memorandum decision and order dated October 13, 1983 (partially reproduced at 5a-12a**), the district court held that shipyard workers' asbestos-

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* Each respondent's respective corporate parents, subsidiaries (other than wholly owned subsidiaries) and affiliates are set forth in the Appendix hereto.

**References such as (5a) are to pages of the Appendix attached to the Petition for a Writ of Certiorari. The judgments in Lostal, Spiers and Rosenberg are dated April 9, 1984. By an order of the court of appeals dated June 22, 1984, after the Joint Appendix had been filed in that court, the appeal from the judgments in Lostal, Spiers and Rosenberg was consolidated with the appeal in Galiardi.

caused injuries, of the sort alleged here, are not a traditional concern of admiralty law. The district court held that it lacked admiralty jurisdiction over petitioners' claims. (10a).

By order filed October 5, 1984, the court of appeals unanimously affirmed the district court's ruling. In affirming, the court of appeals reiterated its prior express holding in Keene Corp. v. United States, 700 F.2d 836 (2nd Cir.), cert. denied, __ U.S. __, 104 S.Ct. 195 (1983), that injuries caused by exposure to asbestos fibers, regardless of where the exposure occurs, do not bear a significant relation to traditional maritime activity and are thus not cognizable under the district court's admiralty jurisdiction. (3a-4a).

REASONS FOR DENYING THE WRIT

A. THE COURT OF APPEALS WAS CORRECT IN RULING THAT PETITIONERS' CLAIMS ARE NOT WITHIN THE DISTRICT COURT'S ADMIRALTY JURISDICTION.

1. The Limits of Federal Admiralty Tort Jurisdiction: Executive Jet Requires a Maritime Locality Plus a Significant Relationship to Traditional Maritime Activity.

Federal admiralty jurisdiction eas its genesis in the Constitution of the United States, U.S. CONST., Art. III, §2, and is vested in the district courts by statute, 28 U.S.C. §1333, which gives them

> . . . original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Historically, the boundary between maritime and non-maritime tort cases turned on the fortuity of the locality of the wrong: "If the wrong occurred on navigable waters, the action [was] within admiralty jurisdiction; if the wrong occurred on land, it [was] not." Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) ("Executive Jet"). The "locality" rule, as this principle is known, has been traced to the earliest days of the Republic and was defined by this Court in The Plymouth, 3 Wall. 20, 35, 18 L.Ed. 125 (1866), which remained the authoritative statement of the locality rule for more than a century. Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 (1971).

When the locality rule was the sole criterion for admiralty tort jurisdiction, it was often criticized for its fortuitous nature. In Professor Black's words, it meant that the Constitutional term "cases of admiralty and maritime jurisdiction" was delimited "not on the basis of clear practical relation of the included or excluded cases to the business of navigation and transport, but on the basis of considerations of historical accident." Black, Admiralty Jurisdiction: Critique and Suggestions, 50

Colum. L. Rev. 259, 266 (1950).* In 1972, this Court reexamined the locality rule in Executive Jet and adopted a new rule of admiralty jurisdiction over torts.

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* See also E. Benedict, The American Admiralty 173 (1850); 7A J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice, ¶¶44.325[3] and 44.325[5] (2d ed. 1972); and American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 233 (1969) ("The federal courts should not be burdened with every case of an injured swimmer."). Petitioners incorrectly state that some maritime nexus was always required for admiralty tort jurisdiction (Petition, p. 4). Courts and scholars may have criticized the locality rule as the sole criterion for admiralty jurisdiction, but locality was plainly the only question upon which admiralty jurisdiction turned prior to Executive Jet. Grant-Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 475 (1922); Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 (1971); Executive Jet, 409 U.S. at 253-54.

In Executive Jet, the Court analyzed the history and purposes of federal admiralty jurisdiction and concluded that the mere fortuity of whether a tort occurs on or over navigable waters is not -- by itself -- a sufficient basis for characterizing it as a "maritime" tort:

> [I]n determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test.

409 U.S. at 261.

The Court laid down a new test of admiralty jurisdiction over torts: in addition to the locality rule, which remained intact, "the wrong [must] bear

a significant relationship to traditional maritime activity." 409 U.S. at 268.*

The Court offered examples of the "traditional maritime activity" to which a significant relationship must be shown to exist:

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules -- rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty

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* Any lingering doubts that the "locality" plus "significant relationship" rule of Executive Jet applies to torts generally, and not only to aviation torts, was put to rest in Foremost Insurance Co. v. Richardson, 457 U.S. 668, 673 (1982).

> looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

409 U.S. at 269-70. These examples reflect areas where the needs of an interstate and international maritime commerce require the expertise of special admiralty courts and the uniformity of federal admiralty law. It is the need for that expertise and that uniformity -- "its aptness for providing a special-industry court for the maritime industry"* -- which is the essence of admiralty jurisdiction. Foremost

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* G. Gilmore and C. Black, The Law of Admiralty §1-10, p. 30 (2d ed. 1975).

Insurance Co. v. Richardson, 457 U.S. 668, 674-75 (1982).

2. Concerns of Federalism Require a Cautious Approach in Construing the Limits of Of Admiralty Jurisdiction.

In Executive Jet, this Court emphasized that the purpose of the "significant relationship to traditional maritime activity" test was to reserve to the states their traditional jurisdiction over those torts "only fortuitously and incidentally connected with navigable waters." 409 U.S. at 273. The Court thus reiterated a concern about adhering to fundamental principles of federalism which it had restated just a year earlier in Victory Carriers, Inc. v. Law, 404 U.S. 202, 212 (1971). In Victory Carriers, the Court observed

that in determining whether to expand admiralty jurisdiction, "we should proceed with caution . . . ." Id. The Court warned against intrusions by federal courts upon the independence of state governments. 404 U.S. at 212 (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934)). As we demonstrate at pp. 20-28, infra, petitioners' claims have no significant relationship -- indeed, no relationship at all -- to traditional maritime activity.

Principles of federal maritime law -- not state law tort principles -- govern all cases where admiralty jurisdiction does lie [see, e.g., G. Gilmore and C. Black, supra, §§1-17, 1-18, at 47-51; Austin v. Unarco Industries, Inc., 705 F.2d 1, 6 n.1 (1st Cir.),

petition for cert. dismissed, __ U.S. __, 104 S.Ct. 34 (1983); Harville v. Johns-Manville Products Corp., 731 F.2d 775, 778 (11th Cir. 1984)], whether in federal district courts or in state courts under the "savings to suitors" clause of 28 U.S.C. §1333. Thus, if admiralty jurisdiction were available to persons who allegedly inhaled asbestos fibers in shipyards, then federal maritime law, not the states' tort laws, would govern all shipyard asbestos cases, regardless of forum. It is precisely this sort of preemption of substantive state law which dictates "proceeding with caution" and rejecting the potentially enormous expansion of federal admiralty jurisdiction sought by petitioners.

3. The Courts of Appeals Have Overwhelmingly Rejected Admiralty Jurisdiction in Cases Arising Out of Exposure to Asbestos-Containing Products, Even in Maritime Localities.

In Keene Corp. v. United States, 700 F.2d 836 (2nd Cir.), cert. denied, __ U.S. __, 104 S.Ct. 195 (1983) ("Keene"), the court of appeals for the Second Circuit had previously ruled that injuries caused by the alleged inhalation of asbestos fibers -- whether or not in a maritime locality -- are not cognizable under admiralty jurisdiction because, under the Executive Jet test, they do not bear a significant relationship to traditional maritime activity. Keene at 844-45.

The court of appeals had underscored its conclusion -- that the hazards of exposure to asbestos, regard-

less of where that exposure took place, simply do not bear a significant relationship to traditional maritime activity -- by expressly rejecting the reasoning of White v. Johns-Manville Corp., 662 F.2d 243 (4th Cir. 1981), cert. denied, 454 U.S. 1163 (1982) ("White II"), the only case in which any circuit court of appeals has upheld admiralty jurisdiction over personal injury claims of shipyard workers who allegedly inhaled asbestos fibers. Keene at 844-45. The authority of Keene and the express rejection of White II were reiterated by the court of appeals in the instant cases. (4a).

While the Fourth Circuit was the first court of appeals to consider the question, every other court of appeals,

in addition to the Second Circuit, subsequently considering the question has rejected the reasoning of White II and held that there is no admiralty jurisdiction over alleged asbestos-related personal injury claims in shipyard cases. Myrhan v. Johns-Manville Corporation, 741 F.2d 1119 (9th Cir. 1984) ("Myrhan"); Harville v. Johns-Manville Corp., 731 F.2d 775 (11th Cir. 1984) ("Harville"); Austin v. Unarco Industries, Inc., 705 F.2d 1 (1st Cir.), petition for cert. dismissed, ___ U.S. ___, 104 S.Ct. 34 (1983) ("Austin"); Owens-Illinois, Inc. v. United States District Court for the Western District of Washington at Tacoma, 698 F.2d 967

(9th Cir. 1983)("Owens-Illinois").* All of these courts have reached the same conclusion the court of appeals for the Second Circuit reached in Keene: shipyard workers' asbestos-related claims do not have the requisite significant relationship to traditional maritime activity to permit the exercise of admiralty jurisdiction.

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* Petitioners do not even attempt to distinguish the facts or the careful reasoning of Keene, Myrhan, Harville, Austin or Owens-Illinois. Instead, petitioners insist that these cases were all decided without the "benefit" of Director, Office Workers' Compensation Programs v. Perini North River Associates, 459 U.S. 297 (1983), a case which, according to petitioners, represents this Court's latest ruling on the limits of the district courts' admiralty tort jurisdiction pursuant to 28 U.S.C. §1333. As we demonstrate below, at pp. 28-35, infra, petitioners are wrong: Perini has nothing to do with the issue raised by the petition.

4. The Principles of Executive Jet and Its Progeny Mandate the Conclusion Reached By the District Court and the Court of Appeals: There is No Admiralty Jurisdiction Over Petitioners' Claims.

In assessing the substantiality of any relationship between the alleged wrong and traditional maritime activity under the Executive Jet test, most courts have considered some or all of the four factors first set forth in Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974): "the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and type of injury; and traditional concepts of the role of admiralty law." 485 F.2d at 525. E.g., T.J. Falgout Boats, Inc. v. United States, 508 F.2d 855, 857 (9th Cir. 1974), cert.

denied, 421 U.S. 1000 (1975); Edynak v. Atlantic Shipping Inc., 562 F.2d 215, 220-21 (3rd Cir. 1977), cert. denied, 434 U.S. 1034 (1978); and Kayfetz v. Walker, 404 F. Supp. 75, 76-77 (D. Conn. 1975) (Lumbard, Cir. J.). Some or all of these factors were also utilized by the various courts of appeals in considering whether there is admiralty jurisdiction over shipyard workers' asbestos-related tort claims.*

Each of these four factors compels the same conclusion: the second prong of the Executive Jet test -- the "sig-

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* There was no issue below whether petitioners met the first prong -- the locality rule -- of the Executive Jet test, because respondents had assumed, for the purposes of the motion to dismiss only, that petitioners could satisfy the locality rule. (7a).

nificant relationship to traditional maritime activity" -- simply cannot be met in cases of shipyard workers' asbestos-related tort claims.

(a) The functions and roles of the parties. Shipyard workers engaged in ship construction and ship repair do not perform maritime roles such as would be the case with a member of a ship's crew engaged in nautical functions. For example, as the Ninth Circuit stated in Owens-Illinois,

> [p]laintiff's job, installing and cleaning up around the installation of asbestos, is hardly a distinctively maritime role, in contrast to the navigational functions of the crew of a ship engaged in ocean or river shipping.

Owens-Illinois at 970-71. What is crucial in assessing this factor is not merely the importance of plaintiffs'

activities to maritime commerce.

Harville at 784. Rather,

> the question properly asked is whether the actual tasks the workers perform bear any inherent relationship to maritime activity, that is, whether the plaintiffs' jobs are identical to those undertaken by land-based workers and are connected to maritime affairs merely because performed aboard ship, or whether they are tasks somehow unique to maritime service or work traditionally done by seamen . . . The plaintiffs here were engaged in trades, such as pipefitting, welding, and insulating, linked more with the land than with the sea. Their skills and training are those of landsmen, not of sailors.

Harville at 784-85 (citations omitted). The occupations at issue in the petitioners' cases (welders, machinists) are in the same category and the court of appeals for the Second Circuit reached the same conclusion below that

the Eleventh Circuit reached in Harville. (3a). Thus, petitioners' "'roles and function,' although related to maritime commerce, do not call for the application of admiralty jurisdiction." Harville at 785. See also Myrhan at 1122; Austin at 13-14.

(b) The types of vehicles and instrumentalities involved. That petitioners may have performed their duties in whole or in part upon ships does not, in and of itself, render their activities maritime. As the court of appeals pointed out, unlike the navigational equipment and safety devices of a vessel, "the instrumentalities central to [petitioners'] claims -- asbestos-containing products and the lack of safety equipment -- do not possess mari-

time attributes." (3a). See also Owens-Illinois at 971. "Nothing in the underlying claims would have been different if the plaintiffs had been employed constructing or repairing buildings on land. Consequently, the 'involvement' of vessels . . . is not strong support for the application of admiralty jurisdiction." Harville at 785; Myrhan at 1122.

(c) The causation and type of injury. The alleged cause (exposure to asbestos-containing products) of petitioners' injuries and the nature of their alleged injuries (asbestos-related diseases) are not distinguishable in degree or in kind from identical injuries sustained by persons exposed to asbestos-containing products in land-

based settings. As the court of appeals stated:

> "[T]he causation and types of [petitioners'] injuries are indistinguishable from the same injuries occurring in landbased settings."

(3a). See also Owens-Illinois at 971; Harville at 785; and Austin at 13. "The happenstance that [plaintiff] was exposed to asbestos aboard a ship does not transform exposure to asbestos into a maritime hazard." Myrhan at 1123.

(d) Traditional concepts of the role of admiralty law. The torts alleged by petitioners are not traditionally known in admiralty law; rather, they are garden variety state law claims. As Executive Jet and Foremost Ins. Co. v. Richardson remind us, the traditional purpose of federal admiralty

jurisdiction is to provide courts of special expertise for disputes involving navigation or water-based commerce, areas which require uniformity of law and of application. Petitioners' claims, however, do not involve navigation and to the extent they arise out of shipyard employment and therefore somehow implicate maritime commerce, that relationship is fortuitous and tangential. As the Eleventh Circuit concluded in Harville:

> Admiralty law is not concerned with claims such as those of plaintiffs. We can foresee no way in which a result in this case in favor of either the land-based shipyard workers or the asbestos manufacturing defendants will have any more than the most attenuated impact on maritime commerce. None of the issues that the Supreme Court listed in Executive Jet [quoted at pp.10-11, supra] are involved.

> Rather, the issues that this litigation presents are identical to those presented in countless other asbestos suits; they involve questions of tort law traditionally committed to local resolution. Absent congressional action, the federal interest in these claims is insufficient to justify federal courts supplanting state law with the federal common law of admiralty [citing Executive Jet]. "In the situation before us, which is only fortuitously and incidentally connected to navigable waters . . . the [state] courts could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of [state] tort law without any effect on maritime endeavors" [quoting Executive Jet at 273].

Harville at 786. See also Myrhan at 1122; Owens-Illinois at 971; Austin at 13.

In short, since petitioners cannot demonstrate that their claims bear a "significant relationship to traditional

maritime activity", admiralty jurisdiction does not lie.

5. Petitioners' Reliance on Perini Is Misplaced.

Petitioners claim that Director, Office Workers' Compensation Programs v. Perini North River Associates, 459 U.S. 297 (1983) ("Perini") is this Court's latest pronouncement on the subject of admiralty tort jurisdiction and that the five courts of appeals which have rejected admiralty jurisdiction over asbestos-related injury claims by land-based shipyard workers all erred by rendering their decisions "without the

benefit" of Perini.* Appellants are wrong.

Perini did not in any way alter admiralty tort jurisdiction. Perini involved a federal compensation statute, the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq. ("LHWCA"); it was not a tort action brought under 28 U.S.C. §1333, the general admiralty jurisdiction statute at issue here.

The LHWCA was first enacted in 1927 affording rights of action which do not

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* Owens-Illinois and Keene were decided by the Ninth and Second Circuits respectively a few weeks after Perini. Austin was decided by the First Circuit over two months after Perini. Myrhan, Harville and Lowe were decided by the Ninth, Eleventh and Fifth Circuits respectively more than a year after Perini.

exist under general maritime law. Perini, 459 U.S. at 306-07. Prior to 1972, coverage under the LHWCA was provided to an employee of a statutory "employer" if the employee was injured while working upon navigable waters in the course of his employment. Perini, 459 U.S. at 311. However, in 1972 Congress altered the LHWCA's coverage in two ways: it expanded shoreward the geographical boundaries (the so called "situs") within which compensation coverage would be provided, 33 U.S.C. §903(a), and it brought within the statute's coverage persons "engaged in maritime employment" (the so called "status" test), 33 U.S.C. §902(3). Perini, 459 U.S. at 313-14. Upon reviewing the legislative history, the

Court concluded that Congress did not intend the 1972 amendments to the LHWCA -- a remedial statute entitled to liberal construction -- to withdraw coverage afforded to employees whose claims would have been covered under the LHWCA before the amendments. Rather, the new "status" test was inserted to describe affirmatively the additional class of employees newly covered by virtue of the amendments. Perini, 459 U.S. at 316-19.

This expansion of the LHWCA in no way affects the scope of admiralty jurisdiction and, in fact, is in marked contrast to the narrowing of that jurisdiction which was effected by Executive Jet.* Both the LHWCA and admiralty

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* As discussed above, Executive Jet did not reject the traditional "locality" (footnote continued)

jurisdiction cases employ tests which

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rule, but instead added to it an additional requirement (that the wrong bear a "significant relationship to traditional maritime activity"), Kelly v. United States, 531 F.2d 1144, 1146 (2nd Cir. 1976); Lowe at 1186. Petitioners argue that any claim historically cognizable in admiralty prior to Executive Jet must be cognizable in admiralty after Executive Jet (Petition, pp. 5-7). This is nonsense. By adding the "status" requirement to the "locality" rule, Executive Jet excluded from admiralty jurisdiction certain claims which would have been cognizable in admiralty prior to Executive Jet, when the traditional "locality" rule alone was applied. Indeed, the burden of petitioners' argument is that Perini nullifies Executive Jet.

Petitioners cite Grant-Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922), Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449 (1925), and Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479 (1923) for the proposition that injuries sustained by persons engaged in ship construction or repair aboard vessels in navigable waters are cognizable in admiralty (Petition, pp. 4-5). Petitioners' reliance on these cases is, of course, misplaced because they pre-

(footnote continued)

are frequently referred to, for the sake of brevity, as the "status" test. Although both of these "status" tests are designed to give meaning to the word "maritime," they are two different tests under two different statutes.* Contrary to petitioners' assertion that these two different "status" tests are "virtually

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date Executive Jet and under the then-existing law admiralty jurisdiction was determined on the basis of the locality rule alone.

* As the court of appeals noted, the "status" test under the LHWCA is the provision in 33 U.S.C. §902(3) that employees, for the purposes of statutory compensation coverage, are "persons engaged in maritime employment." (Emphasis added.) The "status" test for "admiralty or maritime" jurisdiction under 28 U.S.C. §1333 is the requirement of Executive Jet that admiralty jurisdiction recognizes claims which, in addition to satisfying the traditional "locality" rule, also "bear a significant relationship to traditional maritime activity." (4a).

identical", (Petition, p. 6), what is "maritime" for purposes of the LHWCA "status" test is not the same as what is "maritime" for purposes of admiralty or maritime jurisdiction under 28 U.S.C. §1333. In fact, the inapplicability of Perini and LHWCA cases to the question of admiralty jurisdiction was expressly underscored by this Court:

> Perini cites our decision in [Executive Jet] and argues that the LHWCA is premised upon admiralty jurisdiction, which requires a connection between an employee and traditional maritime activity. Perini's reliance on Executive Jet is misplaced. . . .
>
> . . . Although the term "maritime" occurs both in 28 U.S.C. §1333(1) and in §2(3) of the [LHWCA], these are two different statutes "each with different legislative histories and jurisprudential interpretations over the course of decades." Boudreaux v. American Workover, Inc., 680

F.2d 1034, 1050 (CA 5 1982) (footnote omitted).

Perini at 320, n.29. Thus, not only is Perini not, as petitioners claim, this Court's latest pronouncement on the "status" prong of the test of admiralty tort jurisdiction -- it is a case in which this Court went out of its way to discourage any such attempted interpretation.

In short, though petitioners argue that in deciding Perini the Court intended to construe admiralty jurisdiction and Executive Jet, the Court took pains to point out that it was doing no such thing. Neither Perini nor the scope of the LHWCA has any bearing on the scope of admiralty tort jurisdiction.

B. THE FOURTH CIRCUIT'S DECISION IN WHITE II IS NOT A SUFFICIENT BASIS FOR GRANTING CERTIORARI.

The question whether claims of injuries resulting from exposure to asbestos-containing products bear a substantial relationship to traditional maritime activity has been presented to this Court on petitions for writs of certiorari twice before. On the first occasion, the court of appeals for the Fourth Circuit had held in White II that there was a significant relationship to traditional maritime activity. On the second, the court of appeals for the Second Circuit held in Keene that there was no such significant relationship. In the latter instance, of course, the conflict between the circuits was a reason asserted for granting a writ of

certiorari. In neither instance did this Court grant certiorari.

As the court of appeals noted below in petitioners' cases, its ruling rests squarely on the authority of its prior decision in Keene. Since this Court denied certiorari in Keene, the only change in the configuration of the circuits is that several additional circuits have joined the line-up rejecting the reasoning and result of White II. At this time, the First, Second, Fifth, Ninth and Eleventh have all reached this conclusion. There has been no further support of White II from any other court of appeals.

Indeed, the Fourth Circuit, whose White II decision was the first by any court of appeals to address the question presented here and whose reasoning in

White II was rejected by each of the five courts of appeals which subsequently considered the issue, has recently granted a rehearing en banc in Oman v. Johns-Manville et al., Nos. 82-1821(L) and 82-2042, Order filed June 6, 1984, to consider whether its own decision in White II should be overruled. If the Fourth Circuit decides en banc to overrule its own decision in White II, it will remove any conflict among the circuits.

Because the legal circumstances have not changed since this Court denied certiorari in the very case on which the court of appeals for the Second Circuit based its decision in petitioners' cases, and because the only court of appeals whose decision creates a conflict among the circuits is considering

en banc overruling that decision, there is no reason to grant certiorari in the instant cases.

CONCLUSION

For the reasons stated above, the decisions below are consistent with the applicable laws and decisions of this Court. The reasons set forth in the petition are without merit and the petition should be dismissed.

February 4, 1985

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APPENDIX

Pursuant to Rule 28.1 of the Supreme Court of the United States, herewith follows a list of the respondent corporations with their respective parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates:

Respondent	
Celotex Corporation:	Jim Walter Corporation
Eagle-Picher Industries, Inc.:	none
GAF Corporation:	none
H.K. Porter Company, Inc.:	none
Keene Corporation:	Bairnco Corporation, Genlyte Group, Inc.
Nicolet Industries, Inc.:	Nu Nic Corp.

Owens-Corning Fiberglas Corporation:	Bayer-Owens-Corning Glass Wool, S.A. (Belgium)
	Veroc Technology A.S. (Norway)
	Fiberglas Canada, Inc.
	Fiberglas Colombia, S.A.
	San Vicente de Castellet (Spain)
	Scandinavian Glasfiber, A.B. (Sweden)
	Vitro-Fibras, S.A. (Mexico)
	Poly Plaster, S.A. (Brazil)
	Amiantit, Fiberglass Industries, Ltd. (Saudi Arabia)
	Asahi Fiber Glass Company, Ltd. (Japan)
	Polyarm, S.A. (Brazil)
Owens-Illinois Corporation:	Sunmaster Corporation

Companhia Industrial Sao Paulo e Rio
Vinta Santa Rita, Ltda.
Cristaleria Peldar, S.A.
Industrial de Materias, Primas, S.A.
Industrial de Vidrio Plano, S.A.
Metalicas Peldar, S.A.
Compania de Vidrios Owens-Illinois de Cuba, S.A.
Cristaleria del Ecuador, S.A.
Middle East Glass Manufacturing Co.
Hellenic-Owens Elefsis Glass Company, S.A.
P.T. Kangar Consolidated Industries
Union Glass and Container Corporation
Owens-Illinois de Puerto Rico
Consol Limited
United Glass Holdings, plc

U.G. Glass Containers
U.G. Closures and Plastics
The Rowenhead Company (U.G.)
Johnson Radley (U.G.)
Fabrica de Vidrio Los Andes, C.A.
Manufacturera de Vidrios Planos, C.A.
Gerresheim Group
St. George Recycling & Manufacturing, Inc.
Cristal-Owens Plastics Ltda.
Hygienic-Lily Limited
Sun-Lily Company, Ltd.
Emballages Laurent, S.A.
Papeteries d'Espaly S.A.R.L.
Papeteries Etienne, S.A.
Kraft, S.A.
Cajas Corrugadas de Mexico, S.A.

	Cajas y Empaques de Occidente, S.A.
	Cajas y Empaques del Pacifico, S.A.
	O-I Schott Process System, Inc.
	P.T. Igar Jaya
	Kimble Italiana, S.p.A.
	Envases de Borosilicato, S.A.
	Health Group, Inc.
	Durobar, S.A.
	Libbey - St. Clair
	Sasaki - Owens Glass Co., Ltd.
	Nippon Electric Glass Company, Ltd.
	Hankuk Electric Glass Co., Ltd.
Pittsburgh-Corning Corporation:	none

Raybestos-Manhattan, Inc.:	On June 28, 1982, Raymark Industries, Inc. merged with and acquired assets of Raybestos-Manhattan, Inc.
Raymark Corporation:	none
Raymark Industries, Inc.:	Raymark Corporation Joint ventures with Daikin-R-M Co., Ltd. and Itapso, S.A. de CV.
Southern Textile Corporation:	H. K. Porter Company, Inc.

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